Supreme Court, U.S.
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No. 02-1245

In The
Supreme Court of the United States

SADAT MUHAMMAD,

Petitioner,

v.

DIAMOND OFFSHORE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT
OF THE STATE OF LOUISIANA

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Diamond Offshore Company is wholly owned by Diamond Offshore Drilling, Inc. Diamond Offshore Drilling, Inc. is a publicly traded stock company. The Lowes Corporation owns 54% of Diamond Offshore Drilling, Inc. stock.

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REASONS FOR DENYING THE PETITION

ARGUMENT

I. Muhammad Cannot Prove A Defect in the Stair Caused Him to Fall; A Remand In Light of *Chao* Would Not Change the Outcome of His Case.

Applicant Muhammad asks this Court to decide the Louisiana Supreme Court departed from this Court's teaching in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 122 S.Ct. 738 (2002) by not remanding his case for trial in light of certain regulations promulgated under the Occupational Health & Safety Act ("OSHA"), 84 Stat. 1590, as amended, 29 U.S.C. § 651 *et seq.* (1994 ed. and Supp. V). Before addressing that argument directly, Respondent DIAMOND OFFSHORE COMPANY ("DIAMOND") points out that a remand in light of *Chao* cannot change the result in his case.

Applicant's claim arose under the Jones Act, 46 U.S.C.§688 and general maritime law affording personal injury remedies to seaman. Applicant fell while carrying a bucket in one hand and long handled brush in the other, descending an exterior stairway, really a ladder, aboard a mobile offshore drilling unit (MODU). Applicant never testified he knew what caused him fall down the stairway. He did not know: if his foot caught on a coaming at the top of the stairway; or if he dragged the brush behind him and caught it on something; or he merely lost his balance; so causing himself to fall. He did know he violated DIAMOND's

safety rules by approaching a ladder without one free hand to grasp a rail and eliminate the possibility of any fall.

In light of applicant's testimony which failed to meet his proof burden as to the cause of his fall, the trial court did not decide whether there was a defect of any sort in the stair or ladder. The trial court did not need to make such a determination. Even assuming there was a defect, applicant could not have proven it was the cause of his fall. Even were this Court to reverse andremand with instructions to apply *Chao*, with the result that applicant gets to argue the ladder did not comply with standards set under OSHA, he will never prove such non-compliance caused his fall. For such practical reasons alone, this Court should not grant this writ application.

II. The U.S. Coast Guard Exercises General Jurisdiction Over Drilling Operations on the Outer Continental Shelf and the MODU in Question Falls Within that Jurisdiction; The Notion the Courts Below Departed From *Chao* is Meritless

Rule 10 of this Court's rules provides that an application for writs of certiorari should generally be based upon a split of opinion among the federal courts of appeal or the failure of a state court of last resort to abide by a controlling rule of law set by this Court. Here the applicant contends the Louisiana Supreme Court failed to apply *Chao* to permit a safety expert to testify that stairs on a mobile offshore drilling unit failed to comply with OSHA regulations. He does not

contend that OSHA, rather than the Coast Guard, is the proper agency to exercise regulatory authority over the MODU in question.

In *Chao* this Court observed Congress vested the Coast Guard with general regulatory authority over the safety of life and property on the high seas and navigable waters of the United States. It is charged it with specific jurisdiction over certain "inspected" vessels and specific aspects of maritime safety. This Court concluded OSHA regulations are not preempted on vessels where the Coast Guard's authority is not specific and where it has not exercised its general authority.

Chao does not teach that uninspected vessels are always governed by OSHA. The jurisdictional issue turns on whether the Coast Guard has exercised its general regulatory authority over marine transportation with respect to conditions aboard such a vessel, whether it has done so with respect to a specific condition in issue, and whether OSHA has regulated with respect to that issue.

Chao recognizes the Coast Guard has regulated extensively in the area of drilling on the Outer Continental Shelf. The MODU here in issue was designed expressly for that activity. She operates in the open sea over the U.S. continental shelf. She is large vessel, manned by two full crews who live and work on board her twenty four hours per day, seven days per week. She is not one of the fourteen "inspected vessels" which fall under the express jurisdiction of the Coast Guard. However, as noted by the Louisiana Third Circuit Court of Appeals in this case, she carries a certificate issued by the Coast Guard and is subject to Coast Guard inspections. *Muhammad v. Diamond*

Offshore Company., 02_0172 (La.App. 3 Cir. 7/10/02); 822 So.2d 869, . She must report spills, injuries, marine casualties to the Coast Guard and must also report to the U.S. Minerals Management Service, which also boards and inspects her. Whereas the Coast Guard's influence and oversight of the vessel is palpable and pervasive, OSHA inspectors never come aboard her.

By contrast, the vessel involved in *Chao* was a small, unmanned drilling barge. It had no accommodations for passengers or crew. It operated exclusively in state inland waters. It is unclear whether the barge, more of a floating work platform than a vessel, had ever been boarded by the Coast Guard. The only Coast Guard regulations found to apply on the barge respected such items as what type of fire extinguishers were required. However, OSHA had regulated with specific respect to the equipment that malfunctioned and caused the explosion and loss of life in that case. Thus by comparison, OSHA's regulatory interest in the barge was great.

The Coast Guard has not promulgated regulations regarding the design and construction of exterior stairs or ladders aboard vessels statutorily classified as "inspected" or aboard MODU's like the one in issue here. However, a naval architect called by DIAMOND testified the ladder in question exceeded the safety standards the Coast Guard set for interior stairs. A former Coast Guard officer called as a marine safety expert by applicant who criticized the stairs wasreduced to testifying the Coast Guard must have overlooked the problem. No matter which way the issue is examined, the stairs in issue fall within the Coast Guard's sphere of authority, not OSHA's.

In *Chao* this Court was trying to resolve a conflict between competing views of the respective jurisdictions of OSHA and the Coast Guard. Had the Occupational Safety and Health Administration itself chosen to inspect the MODU in issue applicant's request might be more compelling. It did not appear to be authorizing private litigants to force OSHA to jockey with the Coast Guard in an area where the Coast Guard's oversight has traditionally been dominant.

III. Even Were Applicant Able to Show the Existence of a Defect, It Would not Absolve Him of Comparative Fault for Failing to Follow Safety Rules

As seen above, applicant failed on the facts of his case because he could not establish an alleged defect in the vessel, OSHA or no, caused his injury. The facts showed he was positively at fault for violating safety policy that he should have kept one hand free for grasping a rail while descending stairs. It is because he was cast with one hundred percent of the fault that he would invoke the rule of *Kernan v. American Dredging Co.*,355 U.S. 426, 438_39, 78 S.Ct. 394, 401, 2 L.Ed.2d 382 (1958). He contends *Kernan* would absolve him of comparative fault were he to prove the existence of a statutory violation.

The defect in applicant's argument stems from the fact that his failure to prove the cause of his injury was a defect in the vessel. This fact is independent and apart from the proof that his own deficient conduct was the sole cause of his injury. Applicant would put

both in one can, shake it up, and tell the Court they wash out clean. This he cannot do.

The rule of *Kernan* requires the statutory violation in issue must be the cause in fact of the injury in order to absolve the claimant of his own comparative fault. Even if the applicant could prove there was a defect in the stairs violating OSHA, he still could not prove such was the cause of his injury. Because it was separately and independently proven that applicant's own failure to observe applicable safety rules caused his injury, *Kernan* cannot wipe out the applicant's own negligence flowing from those facts. Because the alleged statutory violation was not shown to play any part in causing his injury, *Kernan* does not apply.

CONCLUSION

Applicant did not establish the construction of the stair caused his fall. A remand in light of OSHA would not change that result. No court below departed from this Court's teaching in *Chao*. Applicant seeks to inject OSHA into the realm of offshore drilling, an industry heavily regulated by the Coast Guard. His initiative would blur rather than clarify the demarcation of authority between those agencies.

Respondent Diamond respectfully submits this Court must deny applicant's writ application.

Respectfully submitted,

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